BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: Secretary, FCC
For: The Commission

REPLY COMMENTS OF HUBBARD BROADCASTING, INC.

Hubbard Broadcasting, Inc. ("HBI"), by its attorneys, hereby submits its Reply Comments in response to the Commission's July 24, 2006 *Further Notice of Proposed Rulemaking* ("*Further Notice*") in this proceeding.[1] HBI, a company with decades of broadcasting experience, is the parent company of radio and television station licensees in six markets within the United States. By these Reply Comments, HBI requests that in this proceeding the Commission adopt clear and equitable television station ownership rules which would correct the current trend of ownership subterfuge which has been endorsed tacitly by the

[1] FCC 06-93 (rel. July 24, 2006). In Order, DA 06-1663 (rel. September 18, 2006), the Commission extended the reply comment deadline in this proceeding to December 21, 2006, and then in Order, DA 06-2514 (rel. December 15, 2006) the Commission extended the reply comment deadline to January 16, 2007.

Media Bureau but, unfortunately, otherwise ignored by the Commission itself.

As an agency, the Commission has not been applying consistent standards in its consideration of television station consolidations in relatively small markets. Commission regulation of television station ownership in smaller markets is at issue in this proceeding.[2] HBI urges the Commission to conduct a thorough and careful examination of the current conditions for media competition, based upon substantial and credible evidence. It is essential that any adjustment to local television station ownership regulation be based upon substantial evidence that supports action clearly in the public interest. Anything less violates the mandate of the Communications Act that the Commission act only in the public interest.

This is especially the case for smaller television markets where duopolies have never been permitted under the Commission's rules, except by waiver based upon substantial proof of a failed or failing station.[3] Indeed, in the 2003 revisions to the ownership rules, the Commission adopted a revised rule that would have permitted common ownership of up to three television stations under certain circumstances in a few of the very largest markets, but the Commission did not seek to permit duopolies in markets with eight or fewer television stations. The *Prometheus* court stayed, and later reversed, that decision, so at no time has the Commission provided for

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[2] Clearly, there is considerable debate about the public interest benefits, if any, of common ownership of television stations in the same market or "duopoly." *See e.g.,* Comments of Smaller Market Television Stations, dated October 23, 2006; Coalition Request for Underlying Data, dated December 7, 2006 (challenging the validity of University of Michigan studies concerning alleged public interest benefits of television station duopolies); Comments of Consumers Union, Consumer Federation of America and Free Press at 8, dated October 23, 2006; Comments of the Office of Communication of the United Church of Christ, National Organization for Women, Media Alliance, Common Cause, and the Benton Foundation at 7, dated October 23, 2006; Comments of Tribune Company on Further Notice of Proposed Rulemaking at 79, dated October 23, 2006.

[3] Under the version of §73.3555(b) currently in effect, and which has been in effect for years, common ownership of television stations in the same DMA is permitted only if: (1) the Grade B contours of the stations in question do not overlap; or (2) at least eight independently owned and operating full-power stations would be in the market after a proposed consolidation <u>and</u> the proposed combination would not be between two of the top-four ranked stations in the DMA.

duopoly ownership of television stations except in larger markets, which would have at least eight independent stations after the formation of the duopoly along with a flat prohibition of combinations of television stations ranked among the top four stations in any market. Thus, at no time has the Commission seriously considered allowing duopolies in smaller markets or consolidation of higher ranked stations even in markets that might otherwise qualify for the formation of lawful duopolies.

However, the results of these Media Bureau decisions has been to allow private parties to circumvent the clear requirements of the duopoly restrictions by allowing combinations of stations to be formed in markets with fewer than eight television stations and with combinations of network affiliated stations which are ranked in the top-four in those smaller markets. The reality in the broadcasting industry today is that the Commission permits clever lawyering to trump the dictates of §73.3555(b) of the Commission's rules.

HBI is in favor of careful and thorough rule making proceedings which may lead to revisions to the ownership rules, including the duopoly restrictions, in order that fair and impartial ownership standards are put into place through lawful processes. In other words, HBI strongly supports a level competitive playing field. However, such legal proceedings have not taken place and so in many cases, including the ones described below, private interests have cynically circumvented the ownership rules in place and the Bureau has tacitly endorsed such behavior. The public interest and the licensees which adhere to the rules have been disadvantaged. All of the cases noted below share the following characteristics: a purported licensee acquires the license to a network affiliated (top four ranked) television station in a market with far fewer than eight stations, that "licensee" fires almost all employees of the station (in some cases 90% of the station's staff) except for the bare minimum of "fewer than five" and turns over all abandoned personnel functions to another network affiliated (top four ranked) television station in that market, this other station staffs the first station, directly owns and otherwise controls virtually all of the non-license assets (including studio, traffic and transmission systems), sells all of the advertising inventory of both stations, places much or all of the local programming of both stations, and guarantees the debt of both stations. In short, the new "licensee" cedes all competitive and economic control of the station to another station in the same market. The parties in question have formed a single competitive/economic unit in all but licensee name, and upon challenge, the Media Bureau approves it, including by failing to acknowledge the evidentiary record before it.

The Duluth, Minnesota Market

Currently pending before the Commission is the Application for Review of KQDS Acquisition Corp., the licensee of KQDS-TV, Duluth, Minnesota ("KQDS") and WDIO-TV, LLC, the licensee of WDIO-TV, Duluth, Minnesota ("WDIO"), a subsidiary of HBI, of the Bureau's *Decision* of December 14, 2004 (the "*Malara Decision*"),[4] which granted the assignment of the license of KDLH-TV, Duluth, Minnesota ("KDLH"), an NBC affiliate, to Malara Broadcast Group of Duluth Licensee LLC ("Malara"). The assignment of KDLH was a pretext to accomplish the common control of KDLH, with KBJR(TV), Superior, Wisconsin, a CBS affiliate, another television station in the same market. The effect of that grant was to provide Granite Broadcasting Corporation[5] ("Granite") direct control over both of KDLH and KBJR, in the small four-station Duluth-Superior Designated Market Area ("DMA").

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[4] *Malara Broadcast Group of Duluth Licensee LLC,* 19 FCC Rcd 24070 (MB 2004) ("*Malara Decision*"). S*ee also* WDIO and KQDS *Joint Petition to Deny* (filed June 14, 2004); Malara *Opposition to Joint Petition to Deny* (filed June 29, 2004); WDIO and KQDS *Reply* (filed July 12, 2004); and WDIO and KQDS *Motion for Leave to File Supplement* and *Supplement* (filed Dec. 8, 2004).

[5] Granite holds the license for KBJR-TV through a wholly-owned subsidiary, KBJR, Inc.

Due to the *Malara Decision*, Granite now controls the CBS and NBC affiliates serving in the Duluth market. Granite substantially programs both stations, including placing all of the advertising of both stations. Upon the closing, Granite took over staffing of KDLH by cutting its full-time staff from 51 persons to "fewer than five" persons, a staff cut of approximately 90%, and assigning all of their functions to Granite employees.[6] Thus, Granite has direct responsibility for the programming, finances, staffing, facilities and financial performance of both of KBJR and KDLH. HBI requests that the Commission review the record established in the *Malara* Application for Review proceeding for complete details and documentary support.

Granite has stated publicly, before the Securities and Exchange Commission, that it was forming television "duopoly-type" arrangements in markets in which duopolies are prohibited.[7] Clearly, its consolidation of KBJR and KDLH was one of the duopolies it has formed.[8] The Bureau in the *Malara Decision* was unphased by that admission of Granite.

The *Malara Decision* ignored the factual presentation that the combination of KBJR and KDLH would dominate the local advertising market, raising significant concern under Herfindahl-Hirschman Index ("HHI") and the unchallenged showing of impermissible HHI index of 5,288.48 for the 6 p.m. TV news market.[9] The *Malara Decision* did not even acknowledge the antitrust concerns raised by opponents of the consolidation.

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[6] Despite this consolidation, Granite argues that the "Top 4 Ban...unfairly denies [small and midsized] broadcasters the opportunity to leverage the operational efficiencies necessary for their survival." *See* Comments of Granite Broadcasting Corporation at 7, October 23, 2006.

[7] Granite 10-K, at 34; *see* Joint Petition at 16, Attachment 2. Indeed, the KDLH Decision even found that Granite's certified statement that it would form duopolies was "immaterial," dismissing a dispute of fact based upon Granite's own inconsistent statements, without a statutorily required hearing.

[8] Granite also formed a duopoly in Fort Wayne, Indiana, combining its WISE-TV with WPTA-TV's operations, using Malara as a straw man again. *See* FCC File No. BALCT-20040504ACH (granted Dec. 8, 2004).

[9] *See* Joint Petition, Attachment 1 (noting that Granite would control 62% of the local news viewing audience under the proposed arrangement); KQDS acquisition Corp. and WDIO-TV

In the same vein, the Bureau failed to address the losses of diversity and localism in the Duluth market. The Commission has long-standing policies in favor of broadcast ownership diversity and localism.[10] On its face, the combined operation of two of the four Duluth commercial television stations undermines those policies and the *Malara Decision* makes no credible effort to distinguish the circumstances of that case from these fundamental policies. The interlocking arrangements effected by Granite represent a major setback to the Commission's goals of localism and diversity.

In addition to improperly approving formation of the KBJR-KDLH duopoly, the *Malara Decision* failed to address the harm to the public interest resulting from media consolidation in the small Duluth market. For example, the *Malara Decision* did not discuss the unchallenged facts that Granite produces the local news broadcasts for both of KBJR and KDLH, and supplies news programming to several local radio stations, five regional newspapers, including the dominant local daily newspaper, jointly sells the local advertising of KBJR, KDLH, and the local UPN broadcast service, and the WB service carried on the Duluth cable television system, thus materially combining the local programming outlets of CBS, NBC, WB, and UPN, all under Granite.[11] Today, Granite controls the local CBS, NBC, CW and MyNetworkTV outlets.

LLC Reply to Opposition to Application for Review at 4, February 10, 2005.

[10] *See* Joint Petition at 18-19; Joint Reply at 13-14. As Petitioners showed, and the Bureau ignored, the Commission has recognized, "[S]ame-market broadcasters and certain other same-market media entities may raise particular concerns because of [the Commission's] goal of protecting local diversity and competition. Firms with existing local media interests may have an incentive and means to use financing or contractual arrangements to obtain a degree of horizontal integration within a particular local market that should be subject to local multiple ownership limitations." *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, Report and Order*, 14 FCC Rcd 12,559, para. 51 (1999). That is clearly the case here.

[11] *See* Joint Petition to Deny at 17, Attachment 1.

For these reasons, and others, Media Access Project ("MAP") supported the Application for Review of the *Malara Decision.*[12] In urging the reversal of the *Malara Decision,* MAP stated:

> In the *Application for Review,* the Petitioners appeal the December 14, 2004 decision of the Chief, Video Division, *Malara Broadcast Group of Duluth Licensee LLC* [citation omitted], because it authorizes the transparent evasion of the Commission's local duopoly rules in contravention of the Court of Appeals decision in *Prometheus Radio Project v. FCC* [citation omitted], as well as the stay issued in that case. [citation omitted] ... MAP calls upon the Commission to act promptly and decisively to grant the *Application for Review* and take all such other action necessary to stop efforts to subvert the Commission's local television ownership rules in Duluth and other small and medium-sized markets. (Page 1 of attached MAP comments)

In the two years that the Application for Review has been pending, the Commission has taken no action. However, the Bureau has cited the non-final *Malara Decision* as precedent in favor of similar small market television station consolidations and contrary to MAP's request.[13]

On or about December 11, 2006, Granite entered into bankruptcy proceedings before the United States Bankruptcy Court for the Southern District of New York. This recent bankruptcy casts an additional shadow over Granite's ability to provide local service in the Duluth market, including production of news.

The Rochester, Minnesota Market

Similar to the proceedings concerning the Duluth market, HBI subsidiary KAAL-TV, LLC, the licensee of KAAL-TV, Austin, Minnesota ("KAAL"), by its Application for Review, requested that the Commission review and reverse the Bureau's *Decision* dated March 11, 2005, which granted the assignment of the license of KXLT-TV, Rochester, Minnesota ("KXLT").[14] As demonstrated by KAAL, the *KXLT Decision* was in conflict with Commission regulations prohibiting the *de facto* common control of and attributable ownership of two of the top-four

[12] Letter of Media Access Project, June 10, 2005, a copy of which is attached to this Reply.
[13] *See* In re KOWH(TV), Lincoln, Nebraska, 20 FCC Rcd 9738, May 24, 2005.
[14] *See* File No. BALCT-20040609AAL.

network television stations in a single small market. As was the case in the Duluth proceeding, in the Rochester market, the Bureau has permitted virtual common ownership and control of two of the four commercial television stations serving the DMA through common control of the staff, programming, finances and facilities of both stations.

The Bureau committed prejudicial procedural error by failing to address adequately KAAL's arguments that a grant of the assignment of license would harm the public interest by reducing competition for television services in the small DMA comprised of Rochester, Minnesota; Mason City, Iowa; and Austin, Minnesota. In addition, the *KXLT Decision* was premised on erroneous findings as to material questions of fact raised by KAAL that the assignee in that proceeding was not a truly independent buyer.

The Commission Must Act to Enforce Fair Ownership Rules

While HBI has not been a party to other proceedings in which private parties evade the Commission's television station ownership restrictions, it is aware of others. For example:

In re Application of Lincoln Broadcasting, LLC, File No. BTCCT-20040330BDM (transfer of control of the licensee of KOWH(TV), Lincoln, Nebraska)

In re Application of Piedmont Television of Springfield License LLC, File No. BALCT-20061005ADY (assignment of the license of KSPR(TV), Springfield, Missouri)

In re Application of Ackerley Media Group, Inc., File No. BALCT-20050118AID (assignment of the license of KVIQ(TV), Eureka, California)

With little or no public comment, the Bureau has been authorizing television station consolidations in an arbitrary and capricious fashion, without proper authority from the Commission itself. As was shown in the Duluth and Rochester proceedings, private parties are entering into agreements under which two television stations merge all of their employees (except "fewer than five"), merge all of their finances, sales, facilities and commonly obtain programming in markets where their common ownership is impermissible under the express provisions of §73.3555(b) of the

Commission's rules. The Commission has it within its legal authority to review these decisions and provide guidance to the media industry but to date the Commission has declined to do so. HBI urges the Commission to use this proceeding to make clear to the media industry what the actual terms of television station local ownership and control really are.

Reviewing and acting upon the Duluth and Rochester proceedings, and all other similar matters, would be entirely consistent with the mandate of the *Prometheus* court when considering local television markers. In *Prometheus,* the court stated that it was "a glaring inconsistency between rationale and result" to allow levels of local television station concentration exceeding the 1800 HHI benchmark,[15] which is exactly what the Bureau did, but failed to acknowledge, in the *Malara Decision,* and likely did in other proceedings. Similarly, in both of the Duluth and Rochester decisions, the Bureau did not address losses of diversity, another failure noted by the *Prometheus* court.[16]

Continued Commission failure to address the serious issues raised by HBI would perpetuate the current mockery by private interests of the Commission's ownership rules, encourage small market consolidations through subterfuge, and affront the media ownership guidance stated by the *Prometheus* court. In addition, it would undermine the Commission's stated interest in supporting broadcast localism.[17]

Competition is at the heart of the communications industry, as the Commission noted as far back as 1963.[18] The public interest requires that the Commission address the fundamental television station ownership issues for smaller markets that are at stake. It needs to act on the

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15 *Further Notice,* para. 16.

16 *Further Notice,* para *17.*

17 *Broadcast Localism,* Notice of Inquiry, MB Docket No. 04-233, FCC 04-129 (rel. July 1, 2004) ("*Localism NOI*").

18 *Frontier Broadcasting Co.*, 1 RR 50 (rel. Aug. 1, 1963) (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

record and through lawful and fair rule making proceedings if it intends to allow common ownership and/or control of television stations in derogation of the ownership rules as they currently exist. The instant proceeding obviously is the forum within which the Commission may address the current state of competition, localism and diversity for smaller market television, and to the extent appropriate, provide new guidelines and correct past injustices.

Respectfully submitted,

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January 16, 2007

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4113402_v3

June 10, 2005

MEDIA ACCESS PROJECT

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RE: Application for Assignment of License of KDLH-TV, Duluth, Minnesota
File No. BALCT-20040504ABU
Facility ID No. 4691

Dear Mr. Chairman and Commissioners:

This letter is written in support of the January 13, 2005 *Application for Review* filed in this matter by KQDS Acquisition Corp. and WDIO-TV, LLC ("Petitioners"). In the *Application for Review*, the Petitioners appeal the December 14, 2004 decision of the Chief, Video Service Division, *Malara Broadcast Group of Duluth Licensee LLC,* 19 FCCRcd 24070 (MB 2004), because it authorizes the transparent evasion of the Commission's local duopoly rules in contravention of the Court of Appeals decision in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), as well as the stay issued in that case. *Id.*, 373 F.3d at 435.

MAP calls upon the Commission to act promptly and decisively to grant the *Application for Review* and take all such other action necessary to stop efforts to subvert the Commission's local television ownership rules in Duluth and other small and medium-sized markets..

The *Malara* decision authorizes what the assignee freely described to the Securities and Exchange Commission as a "duopoly," through a series of highly dubious and twisted constructions of Commission rules and policy. The decision effectively amends the attribution rules by reinterpreting them so that the 15% limit on programming would no longer include commercials. It credulously accepts a scheme in which the purported licensee is said to be controlling a CBS VHF affiliate with as few as two employees. After overlooking the egregious failure to submit complete information to the Commission in violation of the policies adopted by the Commission in *LUJ, Inc.,* 17 FCCRcd 16980 (2002), the Commission staff nonetheless approves a transaction in which the non-attributable party guarantees the purported licensee's debt, sets its budget, has veto power over its capital expenditures, controls who may purchase the station and directly owns its studios, tower and other major facilities.

In repeatedly and slavishly straining to place form over substance, the *Malara* decision substantially modifies the Commission's local TV ownership rules, and has already spawned several carbon copy transactions. No less importantly, it is part of a pattern which bears ominous resemblance to one of the most unfortunate episodes in recent FCC regulatory history, in which highly technical

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published and unpublished staff decisions allowed creation of the ownership device now referred to as "local marketing agreements" or "LMA's." These precedents were then utilized in a systematic scheme to evade ownership limits that Congress and the courts had declined to modify.

In the early 1990's, when the FCC staff brazenly nurtured *de facto* duopolies in the guise of LMA's, it was not possible for opponents to mount a successful challenge to these evasive tactics. This was in large part because decisions about local media ownership concentration seemed sufficiently insignificant and unnewsworthy to merit press and public attention. Thus, at that time, it was possible to undermine the Commission's ownership rules in a series of seemingly innocuous decisions.

Circumstances have changed. There is a huge and highly motivated sector of the American public which is committed to assuring diversity of ownership and control of the broadcast media. If the Commission persists in authorizing wholesale evasion of its local ownership rules by acts of omission or commission, the public and members of Congress will not stand for it. In short, failure to redress this pattern of abuse threatens to undermine public confidence in the Commission, and will greatly complicate the Commission's ability to complete its pending ownership rulemaking dockets.

Historical Background

In the early 1990's, some members of the Commission, and Commission staff, were frustrated at the unwillingness of Congress to liberalize local ownership limits. Accordingly, the Commission staff issued a series of letter decisions which, despite their brevity, swept away 40 years of precedent and invented the artifice of the LMA. Until then, the FCC viewed so-called "time brokerage" arrangements with deep suspicion, and contractual arrangements in which more than a few hours daily of programming were delegated to non-licensees were often disapproved as an unlawful delegation of control. *See, e.g, Cosmopolitan Broadcasting Co. v. FCC,* 921 F.3d 917, 921-928 (D.C. Cir. 1978). Under these new staff decisions, almost 24 hours per day could be delegated to a single programmer, so long as boilerplate contractual language left nominal control in the hands of the licensee. *See, e.g., Roy Russo*, 5 FCCRcd 7586 (1990); *Joseph Belisle*, 5 FCCRcd 7585 (1990).

This fundamental change in policy was made entirely at the staff level through a series of adjudicatory letter decisions, often unpublished, each building incrementally on the prior actions. *See, e.g., Jones Eastern of the Outer Banks, Inc.*, 6 FCCRcd 3615 (1991), *clarified*, 7 FCCRcd 6800 (1992); *Brian M. Madden*, 6 FCCRcd 1871 (MMB 1991); *Peter D. O'Connell*, 6 FCCRcd 1869 (MMB 1991); *J. Dominic Monahan,* 6 FCC 1867 (MMB 1991). Initially, these new practices were limited to radio stations, although, despite warnings from public interest groups and many responsible broadcasters, they were then extended to television, largely through inaction. Although numerous applications for review and other pleadings calling for prompt review of these actions were submitted to the full Commission, these appeals were not acted upon. Instead, the Commission purported to engage in a series of dilatory policy reviews, *see, e.g., Revision of Radio Rules and Policies*, 6 FCCRcd 3275, 3282 (1991), and other diversions, such as a Field Operations Bureau survey which merely proved that LMA's were increasingly common. *Broadcast Station Time Brokerage Survey Completed*, 7 FCCRcd 1658 (1992). This left the state of the law officially unresolved, and hence, beyond the scope of judicial review, even as the staff continued to countenance more, and more expansive, LMA's. When efforts were made to challenge particular adjudications, the questions were deferred to rulemakings, *see, e.g., Gisela Huberman*, 6 FCCRcd 5397, 5398 (MMB 1991) (approving LMA conditioned on the outcome of "a Notice of Proposed Rule Making that addresses a number of issues, many of which are raised in your...inquiry...."), and when they were disputed in rulemakings, the issues were ignored in favor of case-by-case adjudication. *See, e.g., Revision of Radio Rules and Policies*, 9 FCCRcd 7183, 7192 (1994) (agency action "was not meant to imply that these...issues were somehow closed, but rather was intended to reflect our continuing view that particular situations are better resolved on a case-by-case basis.") A significant factor in the spread of LMA's was the fact that practitioners privately circulated unpublished and oral staff opinions so that the secret "street law" became more widely known within sectors of the communications bar.

Even though there was at no time any definitive Commission statement authorizing these practices, the staff continued to authorize more LMA's despite increasing indications of abuse.[1] Ultimately, as a politically potent base of incumbent LMA operators grew, the parties pressed to legalize the practice, obtaining partial success in the enactment of Section 202(g) of the Communications Act of 1996.[2] At no time, however, have Congress or the courts ever authorized levels of concentration present in the *Malara* proceeding, levels which go far beyond an LMA in subverting the Commission's ownership rules.

Impact of the *Malara* Decision

It is impossible to know exactly how many otherwise impermissible transactions have already been executed in reliance upon the as yet non-final precedent provided by the KDLH-TV decision. However, it is clear that at least several such duopolies that have been created in recent months. Unpublished decisions of which MAP is aware include WISE-TV/WPTA-TV, Fort Wayne, IN (approved by unpublished order) *Public Notice No. 45886* (December 21, 2004), and KAAL-TV/KXLT-TV, Austin and Rochester, MN (approved by unpublished order) *Public Notice No. 45943* (March 17, 2005). In the latter case, the unpublished staff decision allowed the applicants to proceed without submitting the loan guarantee from the company which will own the studio and all other physical assets of the station based solely on the representation that "[T]he Applicants aver that Quincy will not have any debt or equity interest in Sagamorehill." The language quoted in the footnote below is just one example of the "don't ask, don't tell" attitude which the staff has employed in these decisions.[3] It is this kind of double-talk, especially in an unpublished decision, which engenders public hostility to the mass media, mistrust of government in general, and lack of confidence of the FCC in

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[1] *See, e.g., Billboard*, "Are Broadcasters Skirting FCC Duopoly Rules? Some Say Loopholes Let Firms Control Too Many Stations" (March 5, 1994)("The clashes around the country often occur when a broadcaster already owns the allowed two FMs and two AMs, then takes over sales duties for a third crosstown FM....The problem comes when that third FM is, say, owned by a son of the GM who runs other stations in town. Or when it is located down the hall....")

[2] "(g) Local Marketing Agreements.--Nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission."

[3] "We disagree with petitioner's claim that Quincy will have substantial control over the station's finances through its proposed sale and promotional rights, option rights, and Quincy's relationship as guarantor of Sagamorehill's debts....Quincy has submitted a Declaration confirming that it has not and will not make any financial contributions for the guarantee of the loan. Furthermore, Sagamorehill states that it will maintain its own bank account, pay the salaries,... and will maintain responsibility for paying all operational expenses, consistent with the Commission's policies. We also reject...petitioner's claim that Quincy' ownership of the KXLT-TV tower, office and studio space, along with the technical services to be provided...will enable Quincy to exert undue influence over the station's finances...Sagamore Hill will have legal control over and use of the station equipment."

engenders public hostility to the mass media, mistrust of government in general, and lack of confidence of the FCC in particular.

Yet another unpublished order relying upon the *Malara* decision involved KVIQ-TV and KBVU-TV in Eureka, CA. *Public Notice No. 45954* (April 1, 2005). Since the Commission's files reflect no controversy in that case, it is useful to examine an article published in the May 26, 2005 issue of the *North Coast Journal* titled "Sly as a Fox: How Fox 29 Dodged FCC Rules to Build a Local Broadcasting Conglomerate." The article explains, *inter alia*, that after unsuccessful efforts to obtain a duopoly, the applicants reformulated their transaction to employ the KDLH-TV precedent:

> Then, in December, an FCC staff decision in an unrelated case broke the logjam* * * * [The licensee] abandoned its own application to buy the station, transferring rights to Raul Broadcasting of Eureka, a hitherto unknown entity owned by...a friend of...owner Chester Smith....Raul Broadcasting proposed a deal mirroring the relationship formed by Granite and Malara in Duluth. Raul Broadcasting would own the FCC license; Eureka Television would do nearly everything else.

Conclusion

The *Malara* decision represents an extraordinary change in policy that flies in the face of the *Prometheus* stay, in which the Court of Appeals directed that the Commission maintain the *status quo*. It has spawned no fewer than three progeny in just a few months. It is arbitrary agency action, capriciously implemented. Moreover, by end-running the Commission's local TV ownership rules, it also violates the *Prometheus* court's stay.

The American public deserves better. Citizens are entitled to a government which operates fairly and transparently. The FCC should not return to its former practices of disingenuously and secretly blessing blatantly pretextual arrangements which undermine established regulatory and judicial constraints.

The Commission must act decisively and promptly to protect the integrity of its processes. It is no exaggeration to state that how the Commission administers its broadcast ownership policy-making proceedings will be the single greatest determinant of how the American public evaluates the Commission's performance over the next few years. The practices described above, if they are tolerated, through action or inaction, pose a serious threat to how the current membership of the Commission will be viewed.

Sincerely,

Andrew Jay Schwartzman
President and CEO

cc.

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Sly as a Fox

From *North Coast Journal (CA)*, May 26, 2005
By Hank Sims

A few weeks ago, Fox 29 began running new commercial designed to advertise the wares now offered by Eureka Television Group, the company that owns the station.

Backed by thumping electronic music, the self-congratulatory spot highlights the networks and shows that Eureka Television brings to Humboldt County. Fox — American Idol, The O.C., The Simpsons. CBS — CSI, Survivor. UPN — the Oakland A's, the Sacramento Kings, America's Next Top Model. The WB — 7th Heaven, The Gilmore Girls. And Univision — international soccer, Cristina and scores of Latin American soap operas.

The ad was rolled out to mark Eureka Television's takeover of local CBS affiliate KVIQ-TV (Channel 6) late last month, after a protracted battle at the Federal Communications Commission. The company's corporate parent — Sainte Partners of Modesto — was not allowed to buy KVIQ outright, as it had hoped, but it was able to arrange a deal through a third party that gave it the right to effectively operate the station, as well as to handle its advertising accounts. Between Fox and CBS, Eureka Television now has rights to eight of the 10 highest rated shows in the country, as ranked in recent A.C. Nielsen polls.

But the ad also gave a taste of some of the new programming that locals who depend on their rabbit-ear antennas will soon be able to enjoy along with their cable-wired neighbors. Eureka Television has been the local outlet for the Spanish-language network Univision for more than a year now, selling ads that are inserted into the network's local Cox Cable feed. Earlier this year, it acquired rights to do the same for the two smaller English-language networks, UPN and the WB. And in a couple of weeks, the company also will start broadcasting UPN and Univision over the airwaves, on channels 31 and 33 respectively, with the WB possibly to follow.

All this might seem a bit perplexing to someone who remembers the battles over the FCC's plan, announced in the summer of 2003, to relax media ownership rules.

A great hue and cry spread across the nation when the commission proposed to allow, for the first time, a single company to own two broadcast television stations in the same region. Groups ranging from the National Rifle Association to Code Pink, a women's antiwar coalition, protested the change, saying the result of the proposed new rules would be to reduce the number of voices on the air. A year later, a federal appeals court overturned the FCC's proposal and sent it back to the commission for revisions.

The commission has not yet acted on the court's order — as it stands, the rules on media ownership are the same today as they were before June 2003. So how is it that Eureka Television can run not one or two but five broadcast stations in the Humboldt County market?

Answer: By hewing very, very closely to the letter of the law.

The Blue Lake challenge

When Sainte Partners first made its bid for KVIQ — then owned by Ackerley Media Group, a subsidiary of broadcast giant Clear Channel — in March 2004, it asked the Federal Communications Commission to grant it special permission to own two stations in the same market. The commission only grants such permission — known as a "duopoly waiver" — in certain, extreme circumstances. For one, an applicant to buy a second station must demonstrate that no other potential buyers exist. Also, one or both of the stations in question must be deemed to be on the verge of financial failure.

Sainte's waiver application quickly drew opposition from an unlikely quarter — the Blue Lake Rancheria. The local tribe, which has launched an aggressive business development strategy since opening the Blue Lake Casino in 2002, argued to the FCC that Sainte's waiver application did not past muster on several counts. In legal papers filed with the commission, the rancheria criticized the financial information that Sainte and Clear Channel provided in their application, saying it did not conclusively demonstrate that the stations were close to going bust.

The rancheria also said that there was another legitimate buyer who wished to purchase KVIQ, one that did not already operate in the market — the Blue Lake Rancheria itself. The tribe said that it had contacted Ackerley when the station first went on the market, and in its legal briefs it reiterated its desire to buy the station.

In a recent interview, Eric Ramos, the rancheria's chief financial officer, explained why owning a TV outlet in the Eureka market would have been a good business bet for the tribe.

"You hate to always link one of your businesses to another business, but we are already a major purchaser of advertising in Humboldt County," he said, referring to the Blue Lake Casino's large promotional budget. If the rancheria owned a media outlet, it could have spent some of that money on itself.

With the rancheria's objections on file, Sainte's application lingered at the FCC for several months, with attorneys for both sides firing legal arguments back and forth. Then, in December, an FCC staff decision in an unrelated case broke the logjam.

precedent in Duluth

In May 2004, just a couple of months after Sainte filed an application to take over KVIQ's broadcast license, the New York-based Granite Broadcasting Corp. and the Malara Broadcast Group of Florida filed an application to acquire KDLH-TV in Duluth, Minn. In their application, the companies made clear that Granite — which already owned a station in the Duluth area — would be responsible for running the day-to-day operations of the station, including controlling the television broadcast and handling advertising sales. Malara's responsibilities, apart from simply owning the broadcast license, would be minimal. In addition, the terms of the agreement gave Granite the right to buy out Malara if a future change in FCC rules made it legal for the company to do so.

Two other stations in the Duluth area protested the proposed deal. They argued that it would violate the spirit of the commission's regulations on dual ownership, in that Granite would have such a strong interest in the station that they in fact "owned" it, for the FCC's purposes — if not on paper then in reality. In spite of their objections, an FCC staff decision in December approved the transaction.

A couple of weeks later, with its KVIQ application still stalled, Sainte Partners reformulated its proposal to reflect the Duluth ruling. It abandoned its own application to buy the station, transferring rights to Raul Broadcasting of Eureka, a hitherto unknown entity owned by Santa Barbara broadcaster Raul Palazuelos, a friend of Sainte Partners owner Chester Smith. In its own reformulated application with the FCC, Raul Broadcasting proposed a deal mirroring the relationship formed by Granite and Malara in Duluth. Raul Broadcasting would own the FCC license; Eureka Television would do nearly everything else.

Charles Naftalin, a Washington, D.C., attorney who represented the stations that protested the Duluth deal, said last week that arrangements like the one worked out between Raul Broadcasting and Sainte Partners were just what he feared would happen when the ruling in his own case was issued.

"We've taken the position that in allowing this kind of transaction the FCC is setting up a blueprint for stations in small markets to make an end run around the ownership rule," he said. "We think they crossed the line that the FCC draws for local common ownership arrangements. Their business, financial and personal arrangements are so close as to represent dual ownership."

And though the FCC's staff approved the Duluth deal, Naftalin and his clients have appealed the decision to the full commission. If the commission decides to reverse the deal, Naftalin said, other companies who have since followed the "Duluth model" — he knows of one other, in Rochester, Minn. — may stand to see their own merger deals reexamined and possibly overturned.

Ramos said that he has no hard feelings toward Eureka Television, despite the fact that the rancheria spent upwards of $15,000 on legal representation. But he did speak wistfully about the kind of programming he said he wanted to bring to the community: local news, locally produced history programs and Native American-themed shows.

"If I feel bad about it, it's for a couple of reasons," he said. "No. 1, it's few versus many voices in the community. No. 2, we could have done a lot of things that other people in the market haven't done. Maybe we'll get a shot someday."

Small stations, big coverage

With the consummation of the deal late last month, Eureka Television took over operation of KVIQ in almost every particular. Its sales staff now handles KVIQ accounts. Its master control operators mix the station's signal, putting network shows, syndicated programming and local commercials and public service announcements over the station's airwaves.

That's not all they're doing, though. Since acquiring the rights to the three smaller networks — UPN, the WB and Univision — they've also been selling ads and running the switchboard for those stations. Right now, the three networks run only on cable, for which the FCC has a much smaller regulatory role. Cable is a different world. Just as characters on HBO shows like The Sopranos or Deadwood can curse with impunity, without incurring FCC fines, so can companies like Eureka Television sell ads for as many cable channels as they like without fear of running into an FCC limit.

However, Eureka Television has been testing its new transmitters for UPN and Univision, and those stations are scheduled to hit the airwaves full-time next month. And in putting these other stations on the air, Eureka Television is once again sticking to the strict letter of FCC law.

In 1982, the FCC created a new class of broadcasting license for something it called "low power television," or LPTV. Regulations for LPTV are in some ways stricter than regular television broadcast licenses — broadcasters may transmit at a maximum of 1,000 watts of power. In some ways, though, the regulations are looser. Specifically, there is no limit on the number of low-power stations a single owner may operate.

And "low power" is something of a misnomer, at least as far as the local market is concerned. Coverage maps available on the FCC's Web site show that the signal from Eureka Television's low-power transmitters, which are located at the company's broadcast tower in Kneeland, will reach from Trinidad to Rio Dell, and inland nearly to Willow Creek.

"Our low power is as powerful as our high power," said Don Smullin, Eureka Television's general manager, in an interview last week.

The difference, he explained, lies in the protections offered by the FCC. Eureka Television's "high power" stations — KVIQ and Fox 29 — may not be disturbed by signals emanating from adjacent markets. With low power broadcasting, the regulation of the frequency is less stringent. But in an isolated market like Humboldt County, low power broadcasts are unlikely to rub up against other signals anyway.

[Don Smullin in his office]When UPN and Univision hit the airwaves full-time next month, Eureka Television will own four of the six commercial broadcasting stations in the Eureka area. If the WB follows the other Eureka Television stations to the air, that will change to five out of seven.

Such market domination would seem to have competitors running scared, especially in a small market such as the Eureka area. (Nielsen ranks Humboldt County 192nd in size, out of 210 broadcast areas in the United States.) But last week, representatives from KIEM and KAEF, affiliates of NBC and ABC, respectively, said that they weren't yet concerned about the potential impact on their businesses.

"I don't think it will have much effect at all," said Bob Browning, KIEM's general manager. "Until their plans become more clear, we wouldn't see that much of a difference in terms of the impact on the market."

Sarah Smith, who runs KAEF from her office at the channel's sister station in Redding, said that she was focused more on improving her own product, which will soon include the popular Martha Stewart morning show.

"With products like [reruns of] Friends and ABC's lineup, we've got a good base to start from," she said. "So I'm not nearly as concerned about what the competition is doing, I'm worried about what we're doing."

Power grab or local commitment?

For Don Smullin, the rapid growth of the company he heads offers tremendous benefits to area residents, no matter what critics of media consolidation may say.

One of the arguments made by backers of the FCC's proposed 2003 changes in media ownership regulations was that by allowing stations to merge, they created a stronger, more financially viable operation that could provide greater service to local communities.

Smullin said that is exactly what has happened with Eureka Television's acquisition of KVIQ and its expanded programming lineup. Before, he said, who was offering the sports lineup that his UPN outlet will soon be broadcasting throughout the area? Who put Spanish language programming out over the air, a tremendous feat for such a small market? Only his boss' commitment to the community made such services now possible, he said.

"This is unique to Chester Smith," Smullin said. "He had a choice between running away, like [former KVIQ owner] Clear Channel did, or investing more money in the market."

Smith did not return a call seeking comment on this story.

In regard to Ramos' ambitious plans to produce a variety of in-depth local programming, Smullin said that it's easier to dream about such things than to actually do them — and with a lifetime in broadcasting behind him, he knows how difficult and costly television production can be. Smullin said that he hopes that Eureka Television would soon get a news broadcast together — KIEM is the only station to currently offer local news — but that it would likely be dependent on whether or not the old KVIQ building, which is infested with a toxic mold, can be salvaged.

[Dave Silverbrand in his office]But Smullin said that whether or not the company is able to get a news operation together, it has a demonstrated commitment to community service and local operation. That's a sentiment echoed by Dave Silverbrand, the former KVIQ newsman who now serves as the station's general manager.

Silverbrand, who works directly for Raul Broadcasting, now shares offices at the Eureka Television building on Seventh Street in Eureka. He said that he had long been dismayed by the declining reputation of the station, which in the end employed only a few people locally, with the programming piped directly into the area from Salinas.

"My job now is to rebuild the image of Channel 6 in this community," he said.

Silverbrand said that there had been many instances in the past where he heard back from advertisers upset that they could not find anyone who could discuss their spots or their bills. Calls to the Salinas headquarters of the station got lost in the shuffle, he said.

That is something Smullin is determined to avoid.

His family was one of the first in the county to jump into broadcasting — first with radio, when that was the hot new technology, and then with television. He noted that advertisers often call him at home, on weekends, when they have a problem.

Down the street, things are different.

"What's sad for me is to go down to ABC," Smullin said, meaning the KAEF building a few blocks from his own offices. There, he said, you can still see his father's name etched on the cornerstone of the building, alongside the date that the Smullin family founded the station, which is currently owned by a Wichita, Kan., company called Bluestone License Holdings, Inc. It's a large building, but you can count the number of people who work inside it on the fingers of one hand. Everything else is done remotely, from Redding.

That's perfectly legal under FCC rules, too.

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